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No. 92-203

IN THE

Supreme Court of the United States

October Term, 1992

ARKANSAS-PLATTE & GULF PARTNERSHIP,
Petitioner,

v.

THE DOW CHEMICAL COMPANY and
VAN WATERS & ROGERS INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Tenth Circuit correctly determined that the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 to 136y (1988 & Supp. II 1990), particularly in light of its corresponding regulations, 40 C.F.R. Subchapter E (1991), pre-empts state law tort claims when such claims are based upon an alleged failure to warn.

2. Whether the Tenth Circuit correctly determined, as a matter of Colorado law, that Petitioner's claims arose in the late 1980s, such that the codification of FIFRA existing at that time should be applied to the facts of this case.

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PETITION FOR WRIT OF CERTIORARI TO THE
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RESPONDENTS' BRIEF

Respondents The Dow Chemical Company and Van Waters & Rogers Inc. respectfully request that this Court deny Arkansas-Platte & Gulf Partnership's petition for writ of certiorari ("Petition"), and not disturb the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the District of Colorado, *see* Petition at 14a, is reported at 748 F. Supp. 1474 (D. Colo. 1990). The opinion of the United States Court of Appeals for the Tenth Circuit, *see* Petition at 1a, is reported at 959 F.2d 158 (10th Cir. 1992).

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on March 6, 1992. *See* Petition at 1a. A timely motion for rehearing was denied on April 16, 1992. *See* Petition at 37a. On July 1, 1992, Justice White signed an order extending the time for Petitioner to file a petition to and including July 31, 1992. *See* Petition at 39a. By letter dated August 26, 1992 the Clerk of this Court extended the time for Respondents to file a brief in opposition to and including September 15, 1992. *See* App. at A-1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE AND REGULATIONS INVOLVED

The Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 61 Stat. 163, as amended, 7 U.S.C. §§ 136-136y (1988 & Supp. II 1990), provides in pertinent part as follows:

§ 136v. *Authority of States*

(a) *In general*

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) *Uniformity*

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

* * * *

§ 136(p) *Label and labeling.*

(1) *Label.*—The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

(2) *Labeling*.—The term "labeling" means all labels and all other written, printed, or graphic matter—

(a) accompanying the pesticide or device at any time; or

(b) to which reference is made on the label or in literature accompanying the pesticide or device, except to current official publications of the Environmental Protection Agency, the United States Department of Agriculture and Interior, the Department of Health and Human Services, State experiment stations, State agricultural colleges, and other similar Federal or State institutions or agencies authorized by law to conduct research in the field of pesticides.

* * * *

The Environmental Protection Agency has promulgated Labeling Requirements for Pesticides and Devices at 40 C.F.R. Part 156 (1991). These regulations are set forth in full in the attached Appendix. *See* App. at B-1.

STATEMENT OF THE CASE

This is a product liability action involving the pesticide pentachlorophenol ("penta"), which is regulated by FIFRA. Petitioner, Arkansas-Platte & Gulf Partnership ("Petitioner"), filed its Complaint against The Dow Chemical Company ("Dow")[1] and Van Waters & Rogers Inc. ("VW&R")[2] (hereinafter collectively referred to as "Respondents"), alleged manufacturers and/or distributors of the subject penta, on or about September 1, 1989.

The Complaint alleges that certain property, presently owned by Petitioner, became contaminated by penta utilized in a wood treatment operation conducted by Petitioner's predecessor from

[1]The parent companies and subsidiaries (except wholly owned subsidiaries) of The Dow Chemical Company are as follows: Marion Merril Dow, Inc., Gruppo Lepetit S.p.A., and Destec Energy, Inc.

[2]Van Waters & Rogers Inc. has no wholly owned subsidiaries. Univar Corporation is the parent company of Van Waters & Rogers Inc.

1960-72. Petitioner, however, did not own the subject property until June 20, 1985, and asserts that its claim arose, at the earliest, on September 1, 1987. The Complaint contains claims premised upon state law theories of negligence and strict liability, both of which are based wholly on an alleged failure to warn regarding the consequences of using penta.

Respondent Dow moved for summary judgment, and was joined by Respondent VW&R, on grounds that FIFRA pre-empted the state law failure to warn claims asserted by Petitioner. The United States District Court for the District of Colorado denied Respondents' Motion by Order dated October 22, 1990. *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers Inc.*, 748 F. Supp. 1474 (D. Colo. 1990). By subsequent Order of January 22, 1991, that court amended its ruling to certify the issue for appeal pursuant to 28 U.S.C. § 1292(b) (1988). *See* Petition at 34a.

Respondents then petitioned the United States Court of Appeals for the Tenth Circuit for leave to appeal the trial court's denial of summary judgment. The Tenth Circuit granted Respondents' petition to appeal on February 26, 1991. *See* Petition at 36a. After briefing and oral argument, the Tenth Circuit issued its opinion of March 6, 1992, reversing the district court's denial of summary judgment to Respondents, and holding that the state law failure to warn claims asserted by Petitioner were impliedly pre-empted by FIFRA. *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers Inc.*, 959 F.2d 158 (10th Cir. 1992) (hereinafter "*Arkansas-Platte*").

Petitioner subsequently submitted to the Tenth Circuit a petition for rehearing and suggestion for a rehearing *en banc*, which petition and suggestion were denied on April 16, 1992. *See* Petition at 37a. After securing an extension from this Court, Petitioner filed the instant Petition for writ of certiorari on July 30, 1992. *See* Petition at 39a.

SUMMARY OF ARGUMENT

This case involves *only* state law tort claims based on an alleged failure to warn, and the Tenth Circuit's holding is so limited. *See*

Arkansas-Platte, 959 F.2d at 164. The proceedings below and the Petition herein do not address, and do not affect, any other state law claims which might be asserted by Petitioner.[3]

FIFRA is federal legislation designed, *inter alia*, to provide a comprehensive and strictly controlled packaging and labeling scheme for pesticides. FIFRA's statutory and regulatory framework, as well as its legislative history, demonstrate clear congressional intent that regulation and control over the *labeling* of pesticides be vested solely with the United States Environmental Protection Agency ("EPA").

Petitioner's state law claims, based on an alleged failure to provide penta warnings differing from the warnings approved and required by the EPA under FIFRA, impermissibly conflict with EPA's determination of what labeling should be required and permitted to implement the federal policies and purposes of FIFRA. A determination of inadequate warning by a jury would constitute impermissible state law regulation of pesticide labeling. In *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), this Court recognized that state law may be impliedly pre-empted if it interferes with the methods by which a federal statute is intended to achieve its goal. 479 U.S. at 494. The Tenth Circuit's decision expressly followed *Ouellette*'s reasoning to find that inconsistent state requirements, including state common-law standards, should be impliedly pre-empted because they would interfere with the EPA's pesticide labeling regulations:

> State court damage awards based on failure to warn would constitute ad hoc determinations of the adequacy of statutory labeling standards. This would hinder the accomplishment of the full purpose of § 136v(b), which is to ensure uniform labeling standards.

[3]During the pendency of Respondents' Motion for Summary Judgment, Petitioner filed a "Motion for Clarification" which requested the trial court to acknowledge that Petitioner had pled claims in addition to failure to warn claims. By Order dated December 13, 1990, the trial court denied Petitioner's "Motion for Clarification," thereby leaving failure to warn as the sole basis for Petitioner's state law claims of negligence and strict liability. Thereafter, Petitioner filed a Motion to Amend its Complaint to allege claims in addition to failure to warn. This Motion is still pending before the trial court.

959 F.2d at 162. Such state regulation of pesticide labeling is pre-empted by FIFRA. Accordingly, the Tenth Circuit was correct in holding that Petitioner's state law failure to warn claims are impliedly pre-empted by FIFRA.

In *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991), this Court applied an implied pre-emption analysis to 7 U.S.C. § 136v, holding that state police powers to regulate pesticide *use* were not pre-empted by FIFRA, but further indicating in dicta that Congress, by enacting 7 U.S.C. § 136v(b), intended to occupy the more narrow area of pesticide labeling. *Mortier*, 111 S. Ct. at 2487.

Petitioner claims that the Court's recent decision in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), created a new analytical framework for pre-emption cases which bars any manner of implied pre-emption analysis if the subject statute contains pre-emptive-type language. Petitioner is incorrect. To the contrary, *Cipollone* was based upon an express pre-emption analysis, did not tacitly overrule decades of prior pre-emption decisions by this Court, and did not create a new framework for implied pre-emption analyses. In particular, *Cipollone* did not hold that the presence of *any* pre-emptive language within a statute forecloses *all* implied pre-emption analysis. This Court's contemporaneous decision in *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374 (1992), confirms that courts should focus on determining the intent of Congress rather than adhering to artificially narrow categories of either express or implied pre-emption.

Congress' enactment of 7 U.S.C. § 136v(b) within FIFRA clearly evinces its intent that the states not impose "any requirements" differing from labeling requirements established by the EPA under FIFRA. The presence of pre-emptive language in § 136v(b) did not require the Tenth Circuit to use only an express pre-emption analysis. The Tenth Circuit properly determined that § 136v(b) and the regulatory framework of FIFRA impliedly pre-empted state law failure to warn claims.

A review of *Ouellette, Mortier, Cipollone,* and *Gade* leads inexorably to the conclusion that state law requirements regarding the labeling of FIFRA-regulated pesticides, including failure to warn tort claims, are pre-empted by FIFRA. Accordingly, there is no special or important reason why this Court should review the FIFRA pre-emption issue addressed by the Tenth Circuit.

Similarly, there is no divisive conflict between the United States Courts of Appeals or inconsistency with recent decisions of this Court that warrants review of the FIFRA pre-emption issue. Following this Court's 1987 decision in *Ouellette*, the four United States Courts of Appeals that have considered this issue, including the Tenth Circuit's decision in *Arkansas-Platte*, have been unanimous both in finding that FIFRA pre-empts state law failure to warn claims and in rejecting the "choice of reaction" analysis set forth in *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984). Additionally, this Court's decision in *Mortier* recognized in persuasive dicta that Congress intended to pre-empt state law with respect to the labeling and packaging of pesticides. 111 S. Ct. at 2486.

Ferebee now stands as the lone United States Court of Appeals decision to have determined that FIFRA does not pre-empt state law failure to warn tort claims. Moreover, *Ouellette's* rejection of *Ferebee's* "choice of reaction" analysis constructively overruled, or at least substantially undermined, *Ferebee*.[4]

[4]Petitioner appears to misread this Court's recent action in vacating and remanding the Eleventh Circuit's decision in *Papas v. Upjohn Co.*, 926 F.2d 1019, 1021-26 (11th Cir. 1991), *cert. granted, vacated and remanded sub nom. Papas v. Zoecon Corp.*, 112 S. Ct. 3020 (1992), as in some manner reaffirming *Ferebee* and thus rekindling a split of authority within the United States Courts of Appeals. *See* Petition at 13-14. To the contrary, this Court's action in remanding *Papas* for a consistency review, in light of its 1992 decisions concerning pre-emption, does not suggest that a conflict exists between the United States Courts of Appeals which warrants review. Respondents note further that, unlike the Petition and Brief in Opposition before this Court in *Papas* (which predated the *Gade* and *Cipollone* decisions), Petitioner and Respondents have fully briefed the issue of the consistency of the Tenth Circuit's opinion in *Arkansas-Platte* with this Court's most recent pronouncements.

Additionally, there is no special or important reason why this Court should review the Tenth Circuit's application of the 1972 amendments to FIFRA to the facts at issue in this case. There is no dispute that the Petitioner's claims, as a matter of Colorado law, arose long after the effective date of the 1972 FIFRA amendments, Federal Environmental Pesticide Control Act of 1972, Pub. L. 92-516, 86 Stat. 973. Therefore, the Tenth Circuit's application of FIFRA as amended is in accordance with long-standing decisions of this Court and does not raise an issue of retroactivity. *See, e.g., Reynolds v. United States*, 292 U.S. 443 (1934); *Cox v. Hart*, 260 U.S. 427 (1922). Petitioner's assertion that § 4(e) of the 1972 FIFRA legislation constitutes Congress' express directive prohibiting application of the 1972 legislation to the facts of this case is a misstatement of law which was properly rejected by the Tenth Circuit. Section 4(e) of the 1972 legislation deals solely with effective dates of new provisions introduced by that legislation. Again, no issue is presented for review by this Court.

ARGUMENT

I. THE TENTH CIRCUIT'S APPLICATION OF AN IMPLIED PRE-EMPTION ANALYSIS TO 7 U.S.C. § 136v(b) IS ENTIRELY CONSISTENT WITH *OUELLETTE, MORTIER, CIPOLLONE, GADE,* AND NUMEROUS OTHER LONG-STANDING PRE-EMPTION DECISIONS OF THIS COURT. *CIPOLLONE* DID NOT ABOLISH THE TRADITIONAL IMPLIED PRE-EMPTION ANALYSIS APPLIED BY THE TENTH CIRCUIT BELOW.

This Court's decision in *International Paper Co. v. Ouellette,* 479 U.S. 481 (1987), recognized that a state law is "pre-empted if it interferes with the *methods* by which a federal statute was intended to reach that goal." 479 U.S. at 494 (emphasis added). Thus, the traditional implied pre-emption analysis applies to FIFRA because inconsistent state requirements, such as jury verdicts, interfere with the EPA's pesticide labeling regulations set forth at 40 C.F.R. Part 156 (1991). *See* App. at B-1. The Tenth Circuit correctly relied upon this Court's opinion in *Ouellette. Arkansas-Platte,* 959 F.2d at 162.

Indeed, this Court already has applied an implied pre-emption analysis to 7 U.S.C. § 136v in *Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476 (1991). In addition to the express pre-emptive language of § 136v, the Court looked to other language within FIFRA and the legislative history of FIFRA to determine its pre-emptive scope on the issue of local regulation of the use of pesticides. 111 S. Ct. at 2483-84. While finding no pre-emption as to local regulation of the *use* of pesticides, the Court confirmed in dicta that FIFRA's regulatory program as a whole, in addition to the language of § 136v(b), pre-empts the field of pesticide labeling: "local use permit regulations—*unlike labeling* or certification—do not fall within an area that FIFRA's *'program'* pre-empts . . . ." 111 S. Ct. at 2487 (emphasis added).

Petitioner, nevertheless, contends that the opinion of this Court in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), casts aside the traditional analysis used by federal courts for at least the past fifty years and creates a new "analytical framework" for evaluation of implied pre-emption cases. *See* Petition at 8. *Cipollone* does no such thing; the Tenth Circuit's decision is consistent with *Cipollone* and the other established authority of this Court in pre-emption cases.

In *Cipollone*, this Court considered the pre-emptive effect of two federal statutes related to cigarette labeling and advertising. The Court made abundantly clear at the outset that it considered the case to be one of express pre-emption.

> In our opinion, the pre-emptive scope of the 1965 Act and the 1969 Act is governed *entirely* by the express language of § 5 of each Act.

112 S. Ct. at 2618 (emphasis added). The Court went on to state:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a "reliable indicium of congressional intent with respect to state authority, . . . there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation.

Id. (citations omitted). Petitioner seizes on this statement to assert that, if a federal statute contains any pre-emptive-type language, a court is completely barred from so much as considering the implied pre-emptive scope of the federal law. *See* Petition at 9 (incorrectly asserting that the Tenth Circuit's opinion below "does not survive *Cipollone's* directive to give express pre-emptive provisions both exclusive and narrow effect"). Petitioner simply is wrong.

In *Cipollone*, this Court did not abolish the traditional implied pre-emption analysis applied by the Tenth Circuit and other federal courts, nor did it hold that express pre-emption provisions must always be read narrowly. *Cipollone* must be interpreted against the backdrop of this Court's well-established pre-emption doctrine which recognizes that implied pre-emption may exist even when a statute contains a pre-emption provision. If *Cipollone* is read otherwise—as precluding a court from undertaking an implied pre-emption analysis when analyzing a statute containing a pre-emption provision—it effectively and *sub silentio* overrules a number of significant decisions of this Court. *See, e.g.*, *Ingersoll-Rand Co. v. McClendon*, 111 S. Ct. 478, 484-85 (1990); *Northwest Central Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493, 509-22 (1989); *Jones v. Rath Packing Co.*, 430 U.S. 519, 540-43 (1977).

That this Court did not intend *Cipollone* to destroy the validity of the traditional implied pre-emption analysis is demonstrated by *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374 (June 18, 1992). *Gade* predated *Cipollone* by only a few days. *Gade* addressed whether the Occupational Safety and Health Act of 1970 (the "OSH Act"), 84 Stat. 1590 (codified at 29 U.S.C. § 651 *et seq.*), a statute supplemented by numerous complex regulations,[5] pre-empted a state regulation which required training for persons working with hazardous materials. Five justices found that the OSH Act pre-empted such a state requirement. Although Justice Kennedy reached this conclusion on the basis of express

[5]The OSH Act is, in this regard, much more similar to the statutory and regulatory scheme under FIFRA than are the cigarette acts at issue in *Cipollone*.

pre-emption, Justice O'Connor's plurality opinion relied on an implied pre-emption analysis. The plurality opinion emphasized that express and implied pre-emption analyses are not mutually exclusive; the presence of an express pre-emption clause did not foreclose an implied pre-emption analysis:

> Justice Kennedy, while agreeing on the pre-emptive scope of the OSH Act, finds that its pre-emption is express rather than implied. The Court's previous observation that our pre-emption categories are not "rigidly distinct," *English v. General Electric Co.*, 496 U.S. 72, 79 n.5 (1990), is proved true by this case. *We, too, are persuaded that the text of the [OSH] Act provides the strongest indication that Congress intended the promulgation of a federal safety and health standard to pre-empt all nonapproved state regulation of the same issue, but we cannot say that it rises to the level of express pre-emption.*

112 S. Ct. at 2386 n.2 (citations omitted in part, emphasis added). The *Gade* plurality thus reaffirmed that a court may look to the pre-emptive language of a statute as part of an implied pre-emption analysis. This analytical framework is identical to that applied by the Tenth Circuit below. Therefore, contrary to Petitioner's argument, the presence of pre-emptive language in 7 U.S.C. § 136v(b) did not restrict the Tenth Circuit to an express pre-emption analysis.[6]

Gade instructs that a court should focus its pre-emption analysis on determining the intent of Congress rather than adhering to

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[6]Moreover, Petitioner's assertion that *Cipollone* directs that pre-emption provisions must be given a "narrow effect" is clearly erroneous. *See* Petition at 9. To the contrary, this Court in *Cipollone* looked to the specific wording of the particular pre-emptive provision to determine whether Congress intended that provision to be read narrowly or broadly. *See* 112 S. Ct. at 2618. The *Cipollone* opinion contrasted the pre-emptive wording of § 5 of the Federal Cigarette Labeling and Advertising Act of 1965, Pub. L. 89-92, 79 Stat. 282 (codified as amended at 15 U.S.C. §§ 1331-1340), in which "Congress spoke precisely and narrowly," with the broader provision in § 5 of the Public Health Cigarette Smoking Act of 1969, Pub. L. 91-222, 84 Stat. 87: "Compared to its predecessor in the 1965 Act, the plain language of the pre-emption provision in the 1969 Act is much broader." 112 S. Ct. at 2519.

artificially narrow categories of either express or implied pre-emption:

> Our disagreement with Justice Kennedy as to whether the OSH Act's pre-emptive effect is labelled "express" or "implied" is less important than our agreement that the implications of the text of the statute evince a *congressional intent to pre-empt* nonapproved state regulations when a federal standard is in effect.

112 S. Ct. at 2386 n.2 (emphasis added). *See also Cipollone*, 112 S. Ct. at 2617 ("The purpose of Congress is the ultimate touchstone of pre-emption analysis.") (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)); *Mortier*, 111 S. Ct. at 2481 (stating that "[t]he ways in which federal law may pre-empt state law are well established and in the first instance turn on congressional intent."). The presence of pre-emptive language in 7 U.S.C. § 136v(b) clearly evinces Congress' pre-emptive intent.

Finally, the pre-emption analysis set forth in *Cipollone* is based upon certain peculiarities of the federal cigarette acts, and should be limited to express pre-emption cases concerning relatively non-complex statutes. Certainly, the statutes addressed in *Cipollone* differ significantly from the much more complex statutory and regulatory scheme of FIFRA. For example, in the federal cigarette acts, Congress set forth a federal smoking and health policy in the statute, but did not authorize any federal agency to implement that policy through regulations. 112 S. Ct. at 2618 (stating that "[i]n this case, the other provisions of the 1965 and 1969 Acts offer no cause to look beyond § 5 of each Act."). In contrast, FIFRA delegates substantial authority to the EPA to set specific standards for the pesticide program through regulations and an enforcement mechanism.[7] 7 U.S.C. § 136w(a)(1).

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[7]FIFRA, as first enacted in 1947, authorized the Secretary of Agriculture to issue rules and regulations to carry out its provisions. *See*

(footnote continued on next page)

Petitioner argues that *Cipollone* dramatically alters the traditional implied pre-emption analysis applied on a consistent basis by federal courts for many years. This argument, however, is without foundation even within the confines of *Cipollone* and is clearly disproved by Justice O'Connor's opinion in *Gade*. The Tenth Circuit below properly applied the doctrine of implied pre-emption by FIFRA to the facts of this case and reached the correct conclusion. Petitioner has failed to demonstrate a viable basis upon which this Court should review the Tenth Circuit's decision; the Petition, accordingly, should be denied.

II. THERE IS NO DIVISIVE CONFLICT BETWEEN THE COURTS OF APPEALS OR INCONSISTENCY WITH RECENT SUPEME COURT DECISIONS THAT WARRANTS CERTIORARI REVIEW OF FIFRA PRE-EMPTION OF STATE LAW FAILURE TO WARN CLAIMS.

A. UNITED STATES COURTS OF APPEALS HAVE BEEN UNANIMOUS IN REJECTING *FEREBEE*, AND FINDING THAT FIFRA PRE-EMPTS STATE LAW FAILURE TO WARN CLAIMS, FOLLOWING THE SUPREME COURT'S REJECTION IN *OUELLETTE* OF *FEREBEE'S* ANALYSIS.

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§ 6(a) of the 1947 FIFRA. In 1959, the Secretary of Agriculture published regulations for the enforcement of FIFRA which included requirements and standards for pesticide labels. 24 Fed. Reg. 10,873-66 (1959) (codified at 7 C.F.R. Part 362). In December 1970, regulatory authority was transferred from the Department of Agriculture to the newly created EPA. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). Under the current regulatory scheme, a manufacturer must comply with detailed and extensive EPA Labeling Requirements for Pesticides and Devices, 40 C.F.R. § 156.10 (1991), to obtain EPA's approval of the label. *See* App. at B-1. EPA will approve registration of a pesticide only after it determines that the label and packaging comply with all applicable requirements of the statute and its regulations. 40 C.F.R. § 152.112(f)(1991).

In 1984, *Ferebee v. Chevron Chem. Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984) was the first United States Court of Appeals decision to address the issue of whether FIFRA pre-empts state tort claims premised on failure to warn theories. After eight years, *Ferebee's* holding of no pre-emption, based on its now infamous "choice of reaction" analysis, stands in isolation to four other Courts of Appeals, including the Tenth Circuit's decision below, and numerous district courts that have found FIFRA pre-emption on this same issue. Under *Ferebee's* "choice of reaction" analysis, a defendant which receives a tort verdict may opt not to modify or alter its label, but rather choose to comply with differing federal regulatory and state tort law requirements by "continuing to use the EPA-approved label and by simultaneously paying damages to successful tort plaintiffs." 736 F.2d at 1541-42.

This Court rejected *Ferebee's* "choice of reaction" analysis in *International Paper Co. v. Ouellette*, 479 U.S. 481 (1987), a case which considered whether the Clean Water Act's prohibition of state regulation of out-of-state "sources of discharge" pre-empts a nuisance action based on state law: "It would be extraordinary for Congress, after devising an elaborate permit system that sets clear standards, to tolerate common-law suits that have the potential to undermine this regulatory structure." 479 U.S. at 497.[9] Thus, this Court already has recognized the fundamental fallacy of *Ferebee's* "choice of reaction" analysis: "States could do indirectly what they could not do directly." *Id.* at 495.

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[9]Petitioner's assertion, *see* Petition at 25, that the 1988 amendments to FIFRA somehow codified or otherwise reinforced the 1984 *Ferebee* ruling is without merit in light of this Court's 1987 rejection of *Ferebee's* "choice of reaction" analysis in *Ouellette*. Moreover, by 1988, *Ferebee* and its analysis had been harshly criticized by a number of courts. *See, e.g., Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 627-28 (1st Cir. 1987) (describing *Ferebee's* "choice of reaction" analysis as "akin to the free choice of coming up for air after being underwater"); *Fitzgerald v. Mallinckrodt, Inc.*, 681 F. Supp. 404, 407 (E.D. Mich. 1987) (*Ferebee* "arrogates to a single jury the regulatory power explicitly denied to all fifty states' legislative bodies").

None of the succeeding United States Courts of Appeals that have addressed FIFRA pre-emption of state law failure to warn claims have followed *Ferebee* or otherwise affirmed its "choice of reaction" analysis. Instead, they have followed *Ouellette* in clearly and explicitly rejecting both *Ferebee's* "choice of reaction" analysis and its holding of no pre-emption. As the Tenth Circuit explained:

> We decline to follow the D.C. Circuit's holding in *Ferebee* . . . Section 136v(b) clearly narrows the general grant [to states] of § 136v(a) to *exclude* "requirements for labeling or packaging." . . . We do not accept this "choice of reaction" analysis. A business choice between paying damages and changing the label is only notional.

Arkansas-Platte, 959 F.2d at 162 (emphasis in original). Similarly, the Eleventh Circuit rejected *Ferebee* and followed *Ouellette's* directive:

> It might be possible for a manufacturer to comply with both federal regulations and the requirements of state common law as dictated by state law damages awards against pesticide manufacturers, *see Ferebee*, 736 F.2d at 1541-42, but the pressure of such awards would interfere with the EPA's regulatory process because manufacturers would likely press the EPA to change its labeling requirements to reflect the jury awards so as to free the manufacturer from future tort liability for the same jury-found "inadequacies" in labeling.

Papas v. Upjohn Co., 926 F.2d 1019, 1026 (11th Cir. 1991), *cert. granted, vacated and remanded sub nom. Papas v. Zoecon Corp.*, 112 S. Ct. 3020 (1992).

Contemporaneous with the Tenth Circuit's decision in the instant case, the Sixth Circuit independently reached the same conclusion when it affirmed a district court's rejection of *Ferebee* and found that FIFRA pre-empts state law claims based upon allegations of failure to warn. *See National By-Products, Inc. v. Pope*, Nos. 86-207 and 86-397 (E.D. Ky. 1991) (stating that "any claims

respecting Shell's label or the adequacy of warnings on the aldrin product are preempted by FIFRA" and quoting the *Fisher v. Chevron Chem. Co.*, 716 F. Supp. 1283 (W.D. Mo. 1989), statement that "*Ferebee* seems to be justifying weakly a result"), *aff'd*, 1992 U.S. App. LEXIS 6752 (6th Cir. April 6, 1992) (not recommended for full-text publication).

Finally, the Fourth Circuit in *Worm v. American Cyanamid Co.*, No. 91-1749, 1992 U.S. App. LEXIS 14154 (4th Cir. June 19, 1992), rejected *Ferebee* as well and held that 7 U.S.C. § 136v(b) pre-empts any common-law duty that would impose a labeling requirement inconsistent with those established by FIFRA.

> We find the distinction [between payment of damages and a required label alteration] illusory. If federal law mandates a specific label and permits nothing additional or different, it can hardly be urged that a state tort duty based on a warning requirement that is more elaborate and different does not conflict. The manufacturer in that case cannot comply with both. Implicit in the Worms' argument is a notion that common law tort duties are not regulatory. But surely a jury verdict resulting from a pesticide manufacturer's failure to warn of the dangers of the product has an effect no different from a legislatively enacted state regulation requiring the insertion of a specific warning on the pesticide label.

Id. at *16.

Respondents note that certain district court cases have adopted a "choice of reaction" analysis. However, the vast majority of these lower court cases predate the now overwhelming line of authority, including the Tenth, Fourth, Sixth, and Eleventh Circuits, which has rejected *Ferebee* and has instead held that FIFRA pre-empts state law failure to warn claims.

The few district court cases that have continued to apply a *Ferebee*-type analysis generally are predominated by two common characteristics: a strong desire that there continue to be

remedies available to injured plaintiffs, and a desire to preserve other products liability claims, which, although mistakenly denominated as failure to warn claims, are claims of a type not at issue in the instant case.[10] Respondents' motion for summary judgment only concerns those state law claims based upon an alleged failure to warn. The Tenth Circuit's opinion does not address other common-law remedies.

The significance of federal district court decisions is dubious in any event. This Court's jurisdiction generally is predicated on conflicts between or among the courts of appeals, not the district courts. Sup. Ct. R. 10.1(a). No conflict exists among the circuits since this Court's rejection of *Ferebee's* analysis in *Ouellette.* Therefore, certiorari would be, at best, premature.

B. THIS COURT'S INTERPRETATION OF 7 U.S.C. § 136v IN *MORTIER* STRONGLY SUPPORTS A FINDING THAT FAILURE TO WARN CLAIMS ARE PRE-EMPTED.

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[10]For example, in *Burke v. Dow Chem. Co.,* No. 90-3344, 1992 U.S. Dist. LEXIS 10575 (E.D.N.Y. July 16, 1992), the district court recognized that the pesticide manufacturer defendants "are entitled to some preemption protection" and found persuasive the Tenth Circuit's reasoning that a "business choice between paying damages and changing the label is notional." 1992 U.S. Dist. LEXIS 10575 at *35-37. However, *Burke* did not adopt the Tenth Circuit's holding and rejection of *Ferebee* because it did not want to "foreclos[e] recovery to an injured party." *Id.* at *36. The *Burke* court also was troubled by several New York state court decisions that had found that FIFRA completely pre-empted *all* state law tort actions, not just those based on failure to warn. *Id.* (citing *Little v. Dow Chem. Co.,* 559 N.Y.S.2d 788 (N.Y. Sup. Ct. 1990) and *Warner v. American Fluoride Corp.,* No. 10142/83 (N.Y. Sup. Ct. June 19, 1992)). Similarly, although the Fourth Circuit rejected *Ferebee* in *Worm,* it also expressed concern that labeling requirements subject to FIFRA pre-emption not include causes of action based on breaches of "state-imposed standard[s] of care relating to product design, manufacture, testing, and the like." *Worm,* 1992 U.S. App. LEXIS 14154 at *18. The concerns expressed by *Burke* and *Worm*—that an injured party might be left without remedies—do not apply to this case. As referenced earlier in this Brief, the Tenth Circuit held only that claims based upon failure to warn are pre-empted by FIFRA.

The 1991 decision of *Wisconsin Public Intervenor v. Mortier,* 111 S. Ct. 2476 (1991), remains the only decision issued by this Court to have considered and addressed the pre-emptive scope of FIFRA.[11] In *Mortier,* this Court reviewed the issue of whether a town ordinance that placed restrictions on the use of pesticides was pre-empted by FIFRA, 7 U.S.C. § 136v(a). In holding that local regulation of pesticide use is not pre-empted by FIFRA, this Court analyzed whether Congress intended to pre-empt the entire field of pesticide regulation by comparing the congressional grant of authority to states for the regulation of pesticide *use,* 7 U.S.C. § 136v(a), with Congress' withholding of state authority to regulate pesticide *labeling* and packaging, 7 U.S.C. § 136v(b):

> [F]ield pre-emption [over state regulation of pesticide use] cannot be inferred. In the first place, § 136v itself undercuts such an inference. The provision immediately following the statute's grant of regulatory authority to the States declares

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[11]Petitioner's reliance on the *Goodyear Atomic Corp. v. Miller,* 486 U.S. 174 (1988), *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238 (1984), and *English v. General Elec. Co.,* 496 U.S. 72 (1990), decisions to bolster its assertion of no pre-emption is misleading because these decisions address the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.* (1988 and Supp. II 1990), an act that is significantly different from FIFRA. The First Circuit Court of Appeals noted the uniqueness of the Atomic Energy Act in *Palmer v. Liggett Group, Inc.,* 825 F.2d 620 (1st Cir. 1987), and noted that *Silkwood* in particular was not controlling authority on the pre-emption issue because:

> [The] Atomic Energy Act of 1954, 42 U.S.C. § 2011, *et seq.,* at issue in *Silkwood,* contains no preemption provision whatever. Moreover, . . . the Act also expressly reserves significant authority to the states . . . . Further, the enactment and legislative history of the Atomic Energy Act, as amended . . . make clear Congress' explicit judgment that state common law damage actions for injuries caused by nuclear operations should be permitted to continue . . . *Silkwood* thus took for granted the answer to the [preemption] issue that is the central controversy here. It therefore sheds no light at all on the fundamental question in this case—whether state common law damage actions based on alleged failure to provide adequate warnings are permissible in the first instance.

825 F.2d at 628.

> that "[s]uch State shall not impose or continue in effect any requirements for labeling and packaging in addition to or different from those required under" FIFRA. 7 U.S.C. § 136v(b). This language would be pure surplusage if Congress had intended to occupy the entire field of pesticide regulation. Taking such pre-emption as the premise, § 136v(a) would thus grant States the authority to regulate the "sale or use" of pesticides, while § 136v(b) would superfluously add that States did not have the authority to regulate "labeling and packaging," an addition that would have been doubly superfluous given FIFRA's historic focus on labeling to begin with.

Mortier, 111 S. Ct. at 2486 (citing *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 991 (1984)). Thus, this Court reasoned in *Mortier* that Congress did not intend to occupy the entire field of pesticide regulation precisely because Congress *did* intend to pre-empt state regulation with respect to the labeling and packaging of pesticides. Otherwise, Congress would not have enacted the pre-emptive language contained in 7 U.S.C. § 136v(b).

The Tenth Circuit below followed *Mortier* and concluded:

> Thus, the Supreme Court reasoned Congress had not occupied the entire field of pesticide regulation, instead leaving intact the states' historic police powers to consider regional and local factors in regulating *use.* The Court indicated, however, Congress had impliedly pre-empted state regulation in the more narrow area of labeling. While the holding of *Mortier* is confined to the regulation of pesticides by local governments, *id.,* 111 S. Ct. at 2479, we are nevertheless inclined to adopt its construction of FIFRA.

Arkansas-Platte, 959 F.2d at 163 (emphasis in original, footnote omitted). Respondents are not aware of any federal appellate court decision subsequent to *Mortier* that is to the contrary. Accordingly, there is no reason to revisit the instant FIFRA issue because *Mortier* makes clear this Court's position on the issue of FIFRA pre-emption of pesticide labeling.

C. THE *CIPOLLONE* DECISION DOES NOT ALTER OR AFFECT THE COURTS OF APPEALS DECISIONS, INCLUDING THE TENTH CIRCUIT'S DECISION, THAT HAVE FOUND FIFRA PRE-EMPTS FAILURE TO WARN CLAIMS FOR TWO REASONS: THE PRE-EMPTION LANGUAGE OF FIFRA IS MUCH MORE SIMILAR TO THE 1969 CIGARETTE ACT THAN THE 1965 CIGARETTE ACT AND *CIPOLLONE* MUST BE INTERPRETED IN LIGHT OF THIS COURT'S OPINIONS IN *GADE*, *OUELLETTE* AND *MORTIER*.

In *Cipollone,* 112 S. Ct. 2608 (1992), this Court determined the pre-emptive effect of the Federal Cigarette Labeling and Advertising Act of 1965 ("1965 Act"), Pub. L. 89-92, 78 Stat. 282, and the Public Health Cigarette Smoking Act of 1969 ("1969 Act"), Pub. L. 91-222, 84 Stat. 87. The Third Circuit Court of Appeals had held that the petitioner's state law claims, including failure to warn claims, were pre-empted by both the 1965 and 1969 Acts. *Cipollone v. Liggett Group, Inc.,* 893 F.2d 541 (3d Cir. 1990).

This Court found pre-emption of failure to warn claims based only upon the 1969 Act, which reads as follows:

> (b) No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

112 S. Ct. at 2617. By barring "requirement[s] or prohibitions . . . imposed under state law," rather than just "statements," the Court reasoned that the pre-emptive language of the 1969 Act is much broader than that of the 1965 Act. *Cipollone,* 112 S. Ct. at 2619. Further, the Court noted that the phrase "no requirement or prohibition" encompasses common-law rules, and reiterated that the phrase "state law" includes common law as well as statutes and regulations. *Cipollone,* 112 S. Ct. at 2620, *citing Erie R.R. Co. v. Tompkins,* 304 U.S. 64 (1938). Concluding that Congress' pre-emption of state law "requirements" with respect

to cigarette labels barred the petitioner's state law failure to warn claims, this Court stated:

> Petitioner's claims are pre-empted to the extent that they rely on a state law "requirement or prohibition . . . with respect to . . . advertising or promotion." Thus, insofar as claims under either failure to warn theory require a showing that respondents' post-1969 advertising or promotions should have included additional, or more clearly stated, warnings, those claims are pre-empted.

Cipollone, 112 S. Ct. at 2621-22.

The pre-emptive language of FIFRA at 7 U.S.C. § 136v(b) is substantially similar to § 5 of the 1969 Cigarette Act. Both provisions pre-empt state law "requirements." The 1969 Cigarette Act pre-empts state law requirements with respect to advertising and promotion; FIFRA pre-empts state law requirements in the similar arena of labeling and packaging. Considering the similarity of the pre-emptive language of § 5 of the 1969 Cigarette Act and § 136v(b) of FIFRA, and this Court's holding in *Cipollone* that such language pre-empts state law failure to warn claims, this Court's *Cipollone* decision validates the four United States Courts of Appeals decisions which have interpreted 7 U.S.C. § 136v(b) as pre-empting state law failure to warn claims.[12]

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[12]This Court reversed the Third Circuit's decision as it applied to the 1965 Act. 112 S. Ct. at 2619. Congress had enacted the following pre-emptive language at § 5 of the 1965 Act:

> (b) No statement related to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provisions of this Act.

Focusing, in significant part, on use of the term "statement," the Court concluded that Congress "spoke precisely and narrowly" regarding the pre-emptive language of § 5 of the 1965 Act. Considering the divergent regulatory activities undertaken by state legislatures and federal agencies preceding the 1965 Act, this Court held that § 5 "only pre-empted state and federal rulemaking bodies from mandating particular cautionary statements and did not pre-empt state law damages actions."

(Footnote continued on following page)

Cipollone also must be read in the context of this Court's previous rulings in *Ouellette* and *Mortier,* the latter being the only Supreme Court decision to have addressed the pre-emption issue in the context of FIFRA. These decisions affirm that FIFRA pre-emption of state failure to warn claims should be essentially a settled issue; any former split of authority on the FIFRA issue is now resolved in favor of pre-emption.[13] Accordingly, no special or important reason exists for this Court to review the FIFRA pre-emption issue determined by the Tenth Circuit.

III. THE TENTH CIRCUIT'S APPLICATION OF 7 U.S.C. § 136v(b) TO THE FACTS OF THIS CASE DOES NOT RAISE AN ISSUE AS TO RETROACTIVE STATUTORY APPLICATION, IS CONSISTENT WITH ESTABLISHED SUPREME COURT PRECEDENT, AND, AS A MATTER OF STATE LAW INTERPRETATION, HAS NO NATIONAL SIGNIFICANCE.

Completely apart from its pre-emption argument, Petitioner urges this Court to grant certiorari on the issue of whether the Tenth Circuit should have applied the codification of FIFRA existing prior to the 1972 amendments to the statute. *See* Petition at 3, 23-24 (the wood treatment operation conducted by Petition-

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(Footnote continued from previous page)

Cipollone, 112 S. Ct. at 2618-19 (footnote omitted). Section 5 of the 1965 Act is dissimilar to the pre-emptive language set forth in FIFRA, 7 U.S.C. § 136v(b). For example, § 136v(b) is entitled "Uniformity," which emphasizes the purpose of the federal *program* governing pesticide labeling. In contrast, § 5(b) of the 1965 Act was captioned "Pre-emption," a title that should be interpreted as describing the complete scope of pre-emption under the 1965 Act.

[13]In a post-*Cipollone* FIFRA decision, the Nevada Supreme Court recognized *Cipollone,* but relied primarily on this Court's opinion in *Mortier* to find that FIFRA impliedly pre-empted state law failure to warn claims through occupation of the field of pesticide labeling. *Davidson v. Velsicol Chem. Corp.,* No. 22464, 1992 Nev. LEXIS 123 (Nev. August 12, 1992). *See also Yowell v. Chevron Chem. Co.,* No. 17605, 1992 Mo. App. LEXIS 1193 (Mo. Ct. App. July 13, 1992) (also finding implied pre-emption after *Cipollone*).

er's predecessor existed on the property from 1960-72). Holding that Petitioner's *claims* did not arise under Colorado law until the late 1980s, the Tenth Circuit applied the current codification of FIFRA. *Arkansas-Platte*, 959 F.2d at 160.

Respondents note at the outset that Petitioner's so-called retroactivity issue was not addressed by this Court in the *Cipollone* decision. Thus, in the event that the Court's disposition of this case is similar to that in *Papas*, or if the Court intends to grant certiorari on the pre-emption issue, Respondents respectfully suggest that Petitioner has demonstrated no basis upon which the Tenth Circuit's application of the current FIFRA should be disturbed. This aspect of the decision below should remain unaffected by this Court's disposition of the remainder of the Petition.

A. THE TENTH CIRCUIT CORRECTLY DETERMINED THAT THE VERSION OF FIFRA TO BE APPLIED WAS AN ISSUE OF STATE LAW INTERPRETATION AND THAT RETROACTIVITY WAS NOT AN ISSUE IN THIS CASE.

Petitioner contends that the pre-1972 version of FIFRA should apply to the facts of this case even though it has asserted causes of action based upon post-1972 Colorado law.[14] *See* Petition at 20. The Tenth Circuit's application of the current codification of FIFRA to Petitioner's 1987 failure to warn claims, however, does not represent a retroactive application of FIFRA. As the Tenth Circuit correctly recognized:

> The issue here, however, does not concern retroactivity, but rather when the plaintiff's cause of action arose. Our examination of the claim leads us to conclude it arose after 1972. AP&G acquired its property in 1985, found the property contaminated in 1987, and filed suit in 1989.

Arkansas-Platte, 959 F.2d at 160.

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[14]For example, Petitioner's failure to warn claim is based in part on strict liability, a cause of action that was not adopted by the Supreme Court of Colorado until 1975. *See Hiigel v. General Motors Corp.*, 190 Colo. 57, 544 P.2d 983 (1975).

The point in time at which Petitioner's failure to warn claims arose is a matter of state law interpretation. The federal District Court of Colorado, having jurisdiction over Petitioner's claims based upon diversity of citizenship, was bound to apply Colorado law to determine when the claims arose. *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers Inc.*, 748 F. Supp. 1474, 1477 (D. Colo. 1990). The district court held that the post-1972 version of FIFRA, 7 U.S.C. § 136v(b), should apply. The Tenth Circuit, even more explicitly, reached the same result as the district court. *Arkansas-Platte*, 959 F.2d at 160. The Tenth Circuit's opinion should not be disturbed in this regard.[15]

[15]Application of pre-1972 FIFRA would not change the Tenth Circuit's conclusion that state law failure to warn claims were pre-empted. This Court has previously noted that as first enacted in 1947, FIFRA was primarily a licensing and labeling statute. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 991 (1984). Although the 1972 amendments provided substantial changes governing the *use* of pesticides (*see, e.g.*, 7 U.S.C. §§ 136b and 136c), there were few changes in the labeling scheme imposed by the pre-1972 version of the Act. *See generally Ruckelshaus*, 467 U.S. at 991-92 (recognizing the congressional intent that "[t]he [1972] amendments transformed FIFRA from a labeling law into a comprehensive regulatory statute"). The regulation of and restrictions upon manufacturers' labels was very stringent under both the pre-1972 law and the post-1972 law. *See Ruckelshaus*, 467 U.S. at 991 (specifically noting that §§ 2(u)(2) and 3(a)(3) of the 1947 Act set forth the types of information necessary for proper labeling of a registered pesticide including warnings to prevent harm to people, animals, and plants).

None of the four cases cited by Petitioner for the proposition that FIFRA did not pre-empt state tort law warning claims prior to the 1972 amendments actually supports that proposition. *See In re "Agent Orange" Product Liab. Litig.*, 635 F.2d 987, 995 n.14 (2d Cir. 1980), *cert. denied sub nom. Chapman v. Dow Chem. Co.*, 454 U.S. 1128 (1981) (noting in dicta that FIFRA does not displace the *entire* body of state product liability laws, a proposition which Respondents concede); *Hubbard-Hall Chem. Co. v. Silverman*, 340 F.2d 402, 405 (1st Cir. 1965) (specifically noting that the pre-emption issue was not argued); *Griffin v. Planters Chem. Corp.*, 302 F. Supp. 937 (D.S.C. 1969) (addressing regulatory compliance as a defense, but not addressing pre-emption directly); *Muncy v. Magnolia Chem. Co.*, 437 S.W.2d 15 (Texas App. 1968) (not raising the issue of pre-emption).

B. THE TENTH CIRCUIT'S APPLICATION OF 7 U.S.C. § 136v(b) TO THE FACTS OF THIS CASE IS CORRECT AND IN ACCORDANCE WITH ESTABLISHED SUPREME COURT AUTHORITY.

To the extent that the concept of retroactivity has any relevance to the facts of this case, the Tenth Circuit correctly applied the long-standing rule of this Court that a statute is not rendered retroactive because the facts upon which it operates occurred before its effective date:

> Even were we to assume plaintiff's cause of action ripened prior to 1972, we have said it is "fundamental" that "a statute is not rendered retroactive because the facts or requisites upon which its subsequent action depends are drawn from a time antecedent to the enactment."

Arkansas-Platte, 959 F.2d at 160 (quoting *Lohf v. Casey*, 466 F.2d 618, 620 (10th Cir. 1972), citing *Cox v. Hart*, 260 U.S. 427 (1922)). The Tenth Circuit's conclusion also is consistent with this Court's directive that a court must apply the law in effect at the time it renders its decision, unless to do so would result in manifest injustice. *Bradley v. Richmond School Bd.*, 416 U.S. 696, 711 (1974).

C. CONTRARY TO PETITIONER'S ASSERTION, THERE IS NO SPLIT OF AUTHORITY ON WHETHER 7 U.S.C. § 136v(b) SHOULD APPLY.

The federal courts that have addressed the issue have all concluded that 7 U.S.C. § 136v(b) applies to alleged pre-1972 acts and omissions. *See Arkansas-Platte*, 959 F.2d at 160; *Kennan v. Dow Chem. Co.*, 717 F. Supp. 799, 811 (M.D. Fla. 1989) (applying *Bradley* to confirm that § 136v(b) correctly applies to pre-1972 exposure to pesticides when determining whether FIFRA pre-empts failure to warn claims premised on state law). Contrary to Petitioner's unsupported contentions, *see* Petition at 22-23, there is no confusion among the circuits or split of authority on the issue of whether 7 U.S.C. § 136v(b) should apply to the facts of this case.

Moreover, both *Kennan* and the Tenth Circuit correctly recognized that whether the pesticide exposure occurred prior to 1972 would "not negate the fact that a jury award today would constitute regulation by causing manufacturers to change their labels." *Arkansas-Platte*, 959 F.2d at 161 (quoting *Kennan*, 717 F. Supp. at 811). Thus, the only courts to address the issue are in agreement that application of 7 U.S.C. § 136v(b) to alleged pre-1972 acts or omissions does not constitute impermissible retroactive application of the statute.

D. PETITIONER HAS MISINTERPRETED AND MISAPPLIED § 4(e) OF THE 1972 LEGISLATIVE DIRECTIVE.

Most egregious, among all of Petitioner's arguments related to "retroactivity," is its contention that § 4(e) of the 1972 legislation[16] constitutes a congressional directive that the entire legislation have prospective application only. Petitioner's analysis of the statute is patently incorrect and taken wholly out of context. To the contrary, the express congressional purpose of § 4 was only to make certain provisions within the Act "effective gradually over a four-year period because of its complexity and problems involved. . . ." S. Rep. No. 92-838, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993, 4060. As *Kennan* expressly stated: "There is no indication that Congress intended 7 U.S.C. § 137(b) [sic] to apply only to cases arising after the enactment of the statute." 717 F. Supp. at 811.

Section 4(e) must be read in the context of the remainder of § 4, including, in particular, §§ 4(c) and (d). The latter sections describe the new programs and other statutory modifications enacted by the 1972 legislation. For example, the 1972 Act created both criminal and civil penalties and liabilities to third persons. *See, e.g.*, 7 U.S.C. § 1361 (criminal and civil penalties) and 7 U.S.C. § 136m (liability to third party purchasers of pesticides who suffer loss as a result of a registration suspension or cancel-

[16]Pub. L. No. 92-516.

lation). Section 4(e), read in context with those provisions, simply indicates that, for example, the criminal and civil liabilities created by FIFRA, even though part of the October 21, 1972 enactment, would not become effective until the expiration of the time period specified in § 4.[17] Section 4(e), therefore, merely provided for and governed the phased-in implementation of certain portions of the 1972 legislation as to which Congress directed that regulations be promulgated within a specified period of time. To construe § 4(e) as somehow pertaining to state common-law claims is to take that portion of the legislative directive wholly out of context and is grossly inconsistent with the plain language of § 4 when read in its entirety.

The Tenth Circuit correctly stated that this case "does not concern retroactivity." 959 F.2d at 160. Petitioner has identified no basis upon which this conclusion should be disturbed. The applicability of the post-1972 codification of FIFRA is a necessary result from the undisputed determination, as a matter of Colorado law, that Petitioner's claims did not arise until the late-1980s. Certiorari should be denied on this issue.

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[17]Both U.S.C.A. and U.S.C.S. annotators agree:

> Effective date. [referring to indemnity section, 7 U.S.C. § 136m] Section effective at the close of October 21, 1972, except if regulations are necessary for the implementation of any provision that becomes effective on October 21, 1972, and continuation in effect of the provisions of subchapter I of this chapter and regulations thereunder as in effect prior to October 21, 1972, until superseded by provisions of Pub. L. 92-516 and regulations thereunder, see section 4 of Pub. L. 92-516, set out as a note under section 136 of this title.

7 U.S.C.A. § 136m (Historical Note). Also:

> Effective date of section: [referring to indemnity section, 7 U.S.C. § 136m] For effective date of this section, see § 4 of Act Oct. 21, 1972, P.L. 92-516, 86 Stat. 998, set out at 7 U.S.C.S. § 136 note.

7 U.S.C.S. § 136m (History; Ancillary Laws and directives). *See also Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 862 n.4 (1990) ("Congress may delay the effective date of a statute for many reasons having nothing to do with retroactivity, particularly if the statute is complex") (White, J., dissenting).

CONCLUSION

1. The Tenth Circuit's application of an implied pre-emption analysis to 7 U.S.C. § 136v(b) is consistent with this Court's recent decisions in *Ouellette, Mortier, Gade, Cipollone,* and numerous other long-standing pre-emption decisions of this Court. There is no divisive conflict between United States Courts of Appeals on the specific issue of FIFRA pre-emption of state failure to warn claims. To the contrary, following this Court's decisions in *Ouellette* and *Mortier,* all United States Courts of Appeals that have considered the question of FIFRA pre-emption have found that FIFRA pre-empts state law claims based on an alleged failure to warn.

No special or important reason warrants this Court's review or remand of the Tenth Circuit Court of Appeals' decision on this issue. Respondents have fully briefed the effect of this Court's *Gade* and *Cipollone* decisions, which post-date the Tenth Circuit's decision below. These decisions are entirely consistent with the Tenth Circuit's opinion. Accordingly, the Petition for writ of certiorari is properly denied on the question of whether FIFRA pre-empts state law failure to warn claims.

2. Petitioner's argument regarding application of the current codification of 7 U.S.C. § 136v(b) to the facts of this case is completely distinct from, and independent of, the resolution of Petitioner's claims regarding FIFRA pre-emption. The Tenth Circuit's application of 7 U.S.C. § 136v(b) as it existed on the date when Petitioner's cause of action arose under Colorado law is a matter of state law interpretation, does not raise an issue as to retroactive statutory application, is in accordance with all other courts which have addressed this specific issue, and is consistent with established Supreme Court precedent. No reason warrants this Court's review of the Tenth Circuit's application of 7 U.S.C. § 136v(b) to the facts of this case. Accordingly, the Petition for writ of certiorari should be denied on this question as well.

Respectfully submitted,

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APPENDIX

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, DC 20543

WILLIAM K. SUTER,
CLERK OF THE COURT

AREA CODE 202
479-3011

August 26, 1992

David A. Bailey
Parcel, Mauro, Hultin, Spaanstra
1801 California Street
Denver, CO 80202-2636

C. Michael Montgomery
Montgomery, Green, Jarvis, et al.
1050 Seventeenth Street, Ste. 2300
Denver, CO 80265

Re: **Arkansas-Platte and Gulf Partnership**
v. The Dow Chemical Company and
Van Waters & Rogers, Inc.
No. 92-203

Dear Gentlemen:

Your requests of August 18, 1992 and August 19, 1992 for an extension of time within which to file a brief in opposition to the petition for a writ of certiorari in the above-entitled case has been granted; the time has been extended to and including September 15, 1992 for all respondents.

Very truly yours,

WILLIAM K. SUTER, Clerk

By

Christopher W. Vasil
Deputy Clerk

gj
cc: Walter H. Sergeant, II

PART 156—LABELING REQUIREMENTS FOR PESTICIDES AND DEVICES

AUTHORITY: 7 U.S.C. 136-136y.

§ 156.10 Labeling requirements.

(a) *General*—(1) *Contents of the label.* Every pesticide products shall bear a label containing the information specified by the Act and the regu-

lations in this part. The contents of a label must show clearly and prominently the following:

(i) The name, brand, or trademark under which the product is sold as prescribed in paragraph (b) of this section;

(ii) The name and address of the producer, registrant, or person for whom produced as prescribed in paragraph (c) of this section;

(iii) The net contents as prescribed in paragraph (d) of this section;

(iv) The product registration number as prescribed in paragraph (e) of this section;

(v) The producing establishment number as prescribed in paragraph (f) of this section;

(vi) An ingredient statement as prescribed in paragraph (g) of this section;

(vii) Warning or precautionary statements as prescribed in paragraph (h) of this section;

(viii) The directions for use as prescribed in paragraph (i) of this section; and

(ix) The use classification(s) as prescribed in paragraph (j) of this section.

(2) *Prominence and legibility.* (i) All words, statements, graphic representations, designs or other information required on the labeling by the Act or the regulations in this part must be clearly legible to a person with normal vision, and must be placed with such conspicuousness (as compared with other words, statements, designs, or graphic matter on the labeling) and expressed in such terms as to render it likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

(ii) All required label text must:

(A) Be set in 6-point or larger type;

(B) Appear on a clear contrasting background; and

(C) Not be obscured or crowded.

(3) *Language to be used.* All required label or labeling text shall appear in the English language. However, the Agency may require or the applicant may propose additional text in other languages as is considered necessary to protect the public. When additional text in another language is necessary, all labeling requirements will be applied equally to both the English and other-language versions of the labeling.

(4) *Placement of Label*—(i) *General.* The label shall appear on or be securely attached to the immediate container of the pesticide product. For purposes of this Section, and the misbranding provisions of the Act, "securely attached" shall mean that a label can reasonably be expected to remain affixed during the foreseeable conditions and period of use. If the immediate container is enclosed within a wrapper or outside container through which the label cannot be clearly read, the label must also be securely attached to such outside wrapper or container, if it is a part of the package as customarily distributed or sold.

(ii) *Tank cars and other bulk containers*—(A) *Transportation.* While a pesticide product is in transit, the appropriate provisions of 49 CFR parts 170–189, concerning the transportation of hazardous materials, and specifically those provisions concerning the labeling, marking and placarding of hazardous materials and the vehicles carrying them, define the basic Federal requirements. In addition, when any registered pesticide product is transported in a tank car, tank truck or other mobile or portable bulk container, a copy of the accepted label must be attached to the shipping papers, and left with the consignee at the time of delivery.

(B) *Storage.* When pesticide products are stored in bulk containers, whether mobile or stationary, which remain in the custody of the user, a copy of the label of labeling, including all appropriate directions for use, shall be securely attached to the container in the immediate vicinity of the discharge control valve.

(5) *False or misleading statements.* Pursuant to section 2(q)(1)(A) of the Act, a pesticide or a device declared subject to the Act pursuant to § 153.240, is misbranded if its labeling is false or misleading in any particular including both pesticidal and non-pesticidal claims. Examples of statements or representations in the labeling which constitute misbranding include:

(i) A false or misleading statement concerning the composition of the product;

(ii) A false or misleading statement concerning the effectiveness of the product as a pesticide or device;

(iii) A false or misleading statement about the value of the product for purposes other than as a pesticide or device;

(iv) A false or misleading comparison with other pesticides or devices;

(v) Any statement directly or indirectly implying that the pesticide or device is recommended or endorsed by any agency of the Federal Government;

(vi) The name of a pesticide which contains two or more principal active ingredients if the name suggests one or more but not all such principal active ingredients even though the names of the other ingredients are stated elsewhere in the labeling;

(vii) A true statement used in such a way as to give a false or misleading impression to the purchaser;

(viii) Label disclaimers which negate or detract from labeling statements required under the Act and these regulations;

(ix) Claims as to the safety of the pesticide or its ingredients, including statements such as "safe," "nonpoisonous," "noninjurious," "harmless" or "nontoxic to humans and pets" with or without such a qualifying phrase as "when used as directed"; and

(x) Non-numerical and/or comparative statements on the safety of the product, including but not limited to:

(A) "Contains all natural ingredients";

(B) "Among the least toxic chemicals known"

(C) "Pollution approved"

(6) *Final printed labeling.* (i) Except as provided in paragraph (a)(6)(ii) of this section, final printed labeling must be submitted and accepted prior to registration. However, final printed labeling need not be submitted until draft label texts have been provisionally accepted by the Agency.

(ii) Clearly legible reproductions or photo reductions will be accepted for unusual labels such as those silkscreened directly onto glass or metal containers or large bag or drum labels. Such reproductions must be of microfilm reproduction quality.

(b) *Name, brand, or trademark.* (1) The name, brand, or trademark under which the pesticide product is sold shall appear on the front panel of the label.

(2) No name, brand, or trademark may appear on the label which:

(i) Is false or misleading, or

(ii) Has not been approved by the Administrator through registration or supplemental registration as an additional name pursuant to § 152.132.

(c) Name and address of producer, registrant, or person for whom produced. An unqualified name and address given on the label shall be considered as the name and address of the producer. If the registrant's name appears on the label and the registrant is not the producer, or if the name of the person for whom the pesticide was produced appears on the label, it must be qualified by appropriate wording such as "Packed for * * *," "Distributed by * * *," or "Sold by * * *" to show that the name is not that of the producer.

(d) *Net weight or measure of contents.* (1) The net weight or measure of content shall be exclusive of wrappers or other materials and shall be the average content unless explicitly stated as a minimum quantity.

(2) If the pesticide is a liquid, the net content statement shall be in terms of liquid measure at 68° F (20°C) and shall be expressed in conventional American units of fluid ounces, pints, quarts, and gallons.

(3) If the pesticide is solid or semisolid, viscous or pressurized, or is a mixture of liquid and solid, the net content statement shall be in terms of weight expressed as avoirdupois pounds and ounces.

(4) In all cases, net content shall be stated in terms of the largest suitable units, i.e., "1 pound 10 ounces" rather than "26 ounces."

(5) In addition to the required units specified, net content may be expressed in metric units.

(6) Variation above minimum content or around an average is permissible only to the extent that it represents deviation unavoidable in good manufacturing practice. Variation below a stated minimum is not permitted. In no case shall the average con-

tent of the packages in a shipment fall below the stated average content.

(e) *Product registration number.* The registration number assigned to the pesticide product at the time of registration shall appear on the label, preceded by the phrase "EPA Registration No.," or the phrase "EPA Reg. No." The registration number shall be set in type of a size and style similar to other print on that part of the label on which it appears and shall run parallel to it. The registration number and the required identifying phrase shall not appear in such a manner as to suggest or imply recommendation or endorsement of the product by the Agency.

(f) *Producing establishments registration number.* The producing establishment registration number preceded by the phrase "EPA Est.", of the final establishment at which the product was produced may appear in any suitable location on the label or immediate container. It must appear on the wrapper or outside container of the package if the EPA establishment registration number on the immediate container cannot be clearly read through such wrapper or container.

(g) *Ingredient statement*—(1) *General.* The label of each pesticide product must bear a statement which contains the name and percentage by weight of each active ingredient, the total percentage by weight of all inert ingredients; and if the pesticide contains arsenic in any form, a statement of the percentages of total and water-soluble arsenic calculated as elemental arsenic. The active ingredients must be designated by the term "active ingredients" and the inert ingredients by the term "inert ingredients," or the singular forms of these terms when appropriate. Both terms shall be in the same type size, be aligned to the same margin and be equally prominent. The statement "Inert Ingredients, none" is not required for pesticides which contain 100 percent active ingredients. Unless the ingredient statement is a complete analysis of the pesticide, the term "analysis" shall not be used as a heading for the ingredient statement.

(2) *Position of ingredient statement.* (i) The ingredient statement is normally required on the front panel of the label. If there is an outside container or wrapper through which the ingredient statement cannot be clearly read, the ingredient statement must also appear on such outside container or wrapper. If the size or form of the package makes it impracticable to place the ingredient statement on the front panel of the label, permission may be granted for the ingredient statement to appear elsewhere.

(ii) The text of the ingredient statement must run parallel with other text on the panel on which it appears, and must be clearly distinguishable from and must not be placed in the body of other text.

(3) *Names to be used in ingredient statement.* The name used for each ingredient shall be the accepted common name, if there is one, followed by the chemical name. The common name may be used alone only if it is well known. If no common name has been established, the chemical name alone shall be used. In no case will the use of a trademark or proprietary name be permitted unless such name has been accepted as a common name by the Administrator under the authority of section 25(c)(6).

(4) *Statements of percentages.* The percentages of ingredients shall be stated in terms of weight-to-weight. The sum of percentages of the active and the inert ingredients shall be 100. Percentages shall not be expressed by a range of values such as "22-25%." If the uses of the pesticide product are expressed as weight of active ingredient per unit area, a statement of the weight of active ingredient per unit volume of the pesticide formulation shall also appear in the ingredient statement.

(5) *Accuracy of stated percentages.* The percentages given shall be as precise as possible reflecting good manufacturing practice. If there may be unavoidable variation between manufacturing batches, the value stated for each active ingredient shall be the lowest percentage which may be present.

(6) *Deterioration.* Pesticides which change in chemical composition significantly must meet the following labeling requirements:

(i) In cases where it is determined that a pesticide formulation changes chemical composition significantly, the product must bear the following statement in a prominent position on the label: "Not for sale or use after [date]."

(ii) The product must meet all label claims up to the expiration time indicated on the label.

(7) *Inert ingredients.* The Administrator may require the name of any inert ingredient(s) to be listed in the ingredient statement if he determines that such ingredient(s) may pose a hazard to man or the environment.

(h) *Warnings and precautionary statements.* Required warnings and precautionary statements concerning the general areas of toxicological hazard including hazard to children, environmental hazard, and physical or chemical hazard fall into two groups; those required on the front panel of the labeling and those which may appear elsewhere. Specific requirements concerning content, placement, type size, and prominence are given below.

(1) *Required front panel statements.* With the exception of the child hazard warning statement, the text required on the front panel of the label is determined by the Toxicity Category of the pesticide. The category is assigned on the basis of the highest hazard shown by any of the indicators in the table below:

Hazard indicators	Toxicity categories			
	I	II	III	IV
Oral LD_{50}	Up to and including 50 mg/kg	From 50 thru 500 mg/kg	From 500 thru 5000 mg/kg	Greater than 5000 mg/kg
Inhalation LC_{50}	Up to and including .2 mg/liter	From .2 thru 2 mg/liter	From 2 thru 20 mg/liter	Greater than 20 mg/liter
Dermal LD_{50}	Up to and including 200 mg/kg	From 200 thru 2000	From 2,000 thru 20,000	Greater than 20,000
Eye effects	Corrosive, corneal opacity not reversible within 7 days	Corneal opacity reversible within 7 days; irritation persisting for 7 days	No corneal opacity, irritation reversible within 7 days	No irritation
Skin effects	Corrosive	Severe irritation at 72 hours	Moderate irritation at 72 hours	Mild or slight irritation at 72 hours

(i) *Human hazard signal word*—(A) *Toxicity Category I.* All pesticide products meeting the criteria of Toxicity Category I shall bear on the front panel the signal word "Danger." In addition if the product was assigned to Toxicity Category I on the basis of its oral, inhalation or dermal toxicity (as distinct from skin and eye local effects) the word "Poison" shall appear in red on a background of distinctly contrasting color and the skull and crossbones shall appear in immediate proximity to the word "poison."

(B) *Toxicity Category II.* All pesticide products meeting the criteria of Toxicity Category II shall bear on the front panel the signal word "Warning."

(C) *Toxicity Category III.* All pesticide products meeting the criteria of Toxicity Category III shall bear on the front panel the signal word "Caution."

(D) *Toxicity Category IV.* All pesticide products meeting the criteria of Toxicity Category IV shall bear on the front panel the signal word "Caution."

(E) *Use of signal words.* Use of any signal word(s) associated with a higher Toxicity Category is not permitted except when the Agency determines that such labeling is necessary to prevent unreasonable adverse effects on man or the environment. In no case shall more than one human hazard signal word appear on the front panel of a label.

(ii) *Child hazard warning.* Every pesticide product label shall bear on the front panel the statement "keep out of reach of children." Only in cases where the likelihood of contact with children during distribution, marketing, storage or use is demonstrated by the applicant to be extremely remote, or if the nature of the pesticide is such

that it is approved for use on infants or small children, may the Administrator waive this requirement.

(iii) *Statement of practical treatment*—(A) *Toxicity Category I.* A statement of practical treatment (first aid or other) shall appear on the front panel of the label of all pesticides falling into Toxicity Category I on the basis of oral, inhalation or dermal toxicity. The Agency may, however, permit reasonable variations in the placement of the statement of practical treatment is some reference such as "See statement of practical treatment on back panel" appears on the front panel near the word "Poison" and the skull and crossbones.

(B) *Other toxicity categories.* The statement of practical treatment is not required on the front panel except as described in paragraph (h)(1)(iii)(A) of this section. The applicant may, however, include such a front panel statement at his option. Statements of practical treatment are, however, required elsewhere on the label in accord with paragraph (h)(2) of this section if they do not appear on the front panel.

(iv) *Placement and prominence.* All the require front panel warning statements shall be grouped together on the label, and shall appear with sufficient prominence relative to other front panel text and graphic material to make them unlikely to be overlooked under customary conditions of purchase and use. The following table shows the minimum type size requirements for the front panel warning statements on various sizes of labels:

Size of label front panel in square inches	Points	
	Required signal word, all capitals	"Keep out of reach of children"
5 and under	6	6
Above 5 to 10	10	6
Above 10 to 15	12	8
Above 15 to 30	14	10
Over 30	18	12

(2) *Other required warnings and precautionary statements.* The warnings and precautionary statements as required below shall appear together on the label under the general heading "Precautionary Statements" and under appropriate subheadings of "Hazard to Humans and Domestic Animals," "Environmental Hazard" and "Physical or Chemical Hazard."

(i) *Hazard to humans and domestic animals.* (A) Where a hazard exists to humans or domestic animals, precautionary statements are required indicating the particular hazard, the route(s) of exposure and the precautions to be taken to avoid accident, injury or damage. The precautionary paragraph shall be immediately preceded by the appropriate hazard signal word.

(B) The following table depicts typical precautionary statements. These statements must be modified or expanded to reflect specific hazards.

Toxicity category	Precautionary statements by toxicity category	
	Oral, inhalation, or dermal toxicity	Skin and eye local effects
I	Fatal (poisonous) if swallowed [inhaled or absorbed through skin]. Do not breathe vapor [dust or spray mist]. Do not get in eyes, on skin, or on clothing [Front panel statement of practical treatment required.]	Corrosive, causes eye and skin damage [or skin irritation]. Do not get in eyes, on skin, or on clothing. Wear goggles or face shield and rubber gloves when handling. Harmful or fatal if swallowed. [Appropriate first aid statement required.]
II	May be fatal if swallowed [inhaled or absorbed through the skin]. Do not breathe vapors [dust or spray mist]. Do not get in eyes, on skin, or on clothing. [Appropriate first aid statements required.]	Causes eye [and skin] irritation. Do not get in eyes, on skin, or on clothing. Harmful if swallowed. [Appropriate first aid statement required.]
III	Harmful if swallowed [inhaled or absorbed through the skin]. Avoid breathing vapors [dust or spray mist]. Avoid contact with skin [eyes or clothing]. [Appropriate first aid statement required.]	Avoid contact with skin, eyes or clothing. In case of contact immediately flush eyes or skin with plenty of water. Get medical attention if irritation persists.
IV	[No precautionary statements required.]	[No precautionary statements required.]

(ii) *Environmental hazards.* Where a hazard exists to non target organisms excluding humans and domestic animals, precautionary statements are required stating the nature of the hazard and the appropriate precautions to avoid potential accident, injury or damage. Examples of the hazard statements and the circumstances under which they are required follow:

(A) If a pesticide intended for outdoor use contains an active ingredient with a mammalian acute oral LD_{50} of 100 or less, the statement "This Pesticide is Toxic to Wildlife" is required.

(B) If a pesticide intended for outdoor use contains an active ingredient with a fish acute LC_{50} of 1 ppm or less, the statement "This Pesticide is Toxic to Fish" is required.

(C) If a pesticide intended for outdoor use contains an active ingredient with an avian acute oral LD_{50} of 100 mg/kg or less, or a subacute dietary LC_{50} of 500 ppm or less, the statement "This Pesticide is Toxic to Wildlife" is required.

(D) If either accident history or field studies demonstrate that use of the pesticide may result in fatality to birds, fish or mammals, the statement "This pesticide is extremely toxic to wildlife (fish)" is required.

(E) For uses involving foliar application to agricultural crops, forests, or shade trees, or for mosquito abatement treatments, pesticides toxic to pollinating insects must bear appropriate label cautions.

(F) For all outdoor uses other than aquatic applications the label must bear the caution "Keep out of lakes, ponds or streams. Do not contaminate water by cleaning of equipment or disposal of wastes."

(iii) *Physical or chemical hazards.* Warning statements on the flammability or explosive characteristics of the pesticide are required as follows:

Flash point	Required text
(A) Pressurized Containers	
Flash point at or below 20° F. if there is a flashback at any valve opening	Extremely flammable. Contents under pressure. Keep away from fire, sparks, and heated surfaces. Do not puncture or incinerate container. Exposure to temperatures above 130° F may cause bursting.
Flash point above 20° F and not over 80° F or if the flame extension is more than 18 in long at a distance of 6 in from the flame	Flammable. Contents under pressure. Keep away from heat, sparks, and open flame. Do not puncture or incinerate container. Exposure to temperatures above 130° F may cause bursting.
All other pressurized containers	Contents under pressure. Do not use or store near heat or open flame. Do not puncture or incinerate container. Exposure to temperatures above 130° F may cause bursting.
(B) Nonpressurized Containers	
At or below 20° F	Extremely flammable. Keep away from fire, sparks, and heated surfaces.
Above 20° F and not over 80° F	Flammable. Keep away from heat and open flame.
Above 80° F and not over 150° F	Do not use or store near heat or open flame.

(i) *Directions for Use—(1) General requirements—(i) Adequacy and clarity of directions.* Directions for use must be stated in terms which can be easily read and understood by the average person likely to use or to supervise the use of the pesticide. When followed, directions must be adequate to protect the public from fraud and from personal injury and to prevent unreasonable adverse effects on the environment.

(ii) *Placement of directions for use.* Directions may appear on any portion of the label provided that they are conspicuous enough to be easily read by the user of the pesticide product. Directions for use may appear on printed or graphic matter which accompanies the pesticide provided that:

(A) If required by the Agency, such printed or graphic matter is securely attached to each package of the pesticide, or placed within the outside wrapper or bag;

(B) The label bears a reference to the directions for use in accompanying leaflets or circulars, such as "See directions in the enclosed circular:" and

(C) The Administrator determines that it is not necessary for such directions to appear on the label.

(iii) *Exceptions to requirement for direction for use.*—(A) Detailed directions for use may be omitted from labeling of pesticides which are intended for use only by manufacturers of products other than pesticide products in their regular manufacturing processes, provided that:

(*1*) The label clearly shows that the product is intended for use only in manufacturing processes and specifies the type(s) of products involved.

(*2*) Adequate information such as technical data sheets or bulletins, is available to the trade specifying the type of product involved and its proper use in manufacturing processes;

(*3*) The product will not come into the hands of the general public except after incorporation into finished products; and

(*4*) The Administrator determines that such directions are not necessary to prevent unreasonable adverse effects on man or the environment.

(B) Detailed directions for use may be omitted from the labeling of pesticide products for which sale is limited to physicians, veterinarians, or druggists, provided that:

(*1*) The label clearly states that the product is for use only by physicians or veterinarians;

(*2*) The Administrator determines that such directions are not necessary to prevent unreasonable adverse effects on man or the environment; and

(*3*) The product is also a drug and regulated under the provisions of the Federal Food, Drug and Cosmetic Act.

(C) Detailed directions for use may be omitted from the labeling of pesticide products which are intended for use only by formulators in preparing pesticides for sale to the public, provided that:

(*1*) There is information readily available to the formulators on the composition, toxicity, methods of use, applicable restrictions or limitations, and effectiveness of the product for pesticide purposes;

(*2*) The label clearly states that the product is intended for use only in manufacturing, formulating, mixing, or repacking for use as a pesticide and specifies the type(s) of pesticide products involved;

(*3*) The product as finally manufactured, formulated, mixed, or repackaged is registered; and

(*4*) The Administrator determines that such directions are not necessary to prevent unreasonable adverse effects on man or the environment.

(2) *Contents of Directions for Use.* The directions for use shall include the following, under the headings "Directions for Use":

(i) The statement of use classification as prescribed in paragraph (j) of this section immediately under the heading "Directions for Use."

(ii) Immediately below the statement of use classification, the statement "It is a violation of Federal law to use this product in a manner inconsistent with its labeling."

(iii) The site(s) of application, as for example the crops, animals, areas, or objects to be treated.

(iv) The target pest(s) associated with each site.

(v) The dosage rate associated with each site and pest.

(vi) The method of application, including instructions for dilution, if required, and type(s) of application apparatus or equipment required.

(vii) The frequency and timing of applications necessary to obtain effective results without causing unreasonable adverse effects on the environment.

(viii) Specific limitations on reentry to areas where the pesticide has been applied, meeting the requirements concerning reentry provided by 40 CFR part 170.

(ix) Specific directions concerning the storage and disposal of the pesticide and its container, meeting the requirements of 40 CFR part 165. These instructions shall be grouped and appear under the heading "Storage and Disposal." This heading must be set in type of the same minimum sizes as required for the child hazard warning. (See Table in § 162.10(h)(1)(iv))

(x) Any limitations or restrictions on use required to prevent unreasonable adverse effects, such as:

(A) Required intervals between application and harvest of food or feed crops.

(B) Rotational crop restrictions.

(C) Warnings as required against use on certain crops, animals, objects, or in or adjacent to certain areas.

(D) [Reserved]

(E) For restricted use pesticides, a statement that the pesticide may be applied under the direct supervision of a certified applicator who is not physically present at the site of application but nonetheless available to the person applying the pesticide, unless the Agency has determined that the pesticide may only be applied under the direct supervision of a certified applicator who is physically present.

(F) Other pertinent information which the Administrator determines to be necessary for the protection of man and the environment.

(j) *Statement of Use Classification.* By October 22, 1976, all pesticide products must bear on their labels a statement of use classification as described in paragraphs (j) (1) and (2) of this section. Any pesticide product for which some uses are classified for general use and others for restricted use shall be separately labeled according to the labeling standards set forth in this subsection, and shall be marketed as separate products with different registration numbers, one bearing directions only for general use(s) and the other bearing directions for restricted use(s) except that, if a product has both restricted use(s) and general use(s), both of these uses may appear on a product labeled for restricted use. Such products shall be subject to the provisions of paragraph (j)(2) of this section.

(1) *General Use Classification.* Pesticide products bearing directions for use(s) classified general shall be labeled with the exact words "General Classification" immediately below the heading "Directions for Use." And reference to the general classification that suggests or implies that the general utility of the pesticide extends beyond those purposes and uses contained in the Directions for Use will be considered a false or misleading statement under the statutory definitions of misbranding.

(2) *Restricted Use Classification.* Pesticide products bearing direction for use(s) classified restricted shall bear statements of restricted use classification on the front panel as described below:

(i) *Front panel statement of restricted use classification.* (A) At the top of the front panel of the label, set in type of the same minimum sizes as required for human hazard signal words (see table in paragraph (h)(1)(iv) of this section), and appearing with sufficient prominence relative to other text and graphic material on the front panel to make it unlikely to be overlooked under customary conditions of purchase and use, the statement "Restricted Use Pesticide" shall appear.

(B) Directly below this statement on the front panel, a summary statement of the terms of restriction imposed as a precondition to registration shall appear. If use is restricted to certified applicators, the following statement is required: "For retail sale to and use only by Certified Applicators or persons under their direct supervision and only for those uses covered by the Certified Applicator's certification." If, however, other regulatory restrictions are imposed, the Administrator will define the appropriate wording for the terms of restriction by regulation.

[40 FR 28268, July 3, 1975; 40 FR 32329, Aug. 1, 1975; 40 FR 36571, Aug. 21, 1975, as amended at 43 FR 5786, Feb. 9, 1978. Redesignated and amended at 53 FR 15991, 15999, May 4, 1988]